Supreme Court of the United States

OCTOBER TERM, 1946

No. 584

WATERMAN STEAMSHIP CORPORATION, WATERMAN STEAMSHIP AGENCY, LTD., GRACE LINE, INC. and S. S. "CAMPFIRE," her engines, etc.,

Petitioners,

vs.

PAN-AM TRADE & CREDIT CORPORATION and SAMAN HNOS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement.

It is noteworthy that the United States of America has not joined in this petition although it was a party respondent in both Courts below (R. 2), answered (R. 11) and took an appeal from the final decree entered in the District Court (R. 34). It filed a brief in the Circuit Court of Appeals separate from that of the other respondents below and its proctor argued the cause before that Court [156 F. (2d) 603, 604].

Libelants in the District Court obtained a final decree against the United States for specified damages (R. 32, 33), and the latter has not attempted to bring it before this Court for review. The judgment, therefore, is collectible from the United States without further delay. The recovery was for loss of cargo carried on the S. S. *Campfire,* a vessel owned by the United States (R. 8, 11), and it was therefore the actual carrier of the merchandise and the

party which properly should pay for the loss. In this situation, any question the petitioners might raise is moot.

The enumeration of the S. S. *Campfire,* her engines, etc., as one of the petitioners is incorrect and probably an inadvertence. She is not before this Court nor was she ever before the Courts below. Being owned by the United States, she was not subject to process *in rem (Suits in Admiralty Act,* Act of March 9, 1920, C. 95, §1, 41 Stat. 525, 46 U. S. C. §741); such process was therefore not issued; she was not claimed; no answer was filed on her behalf; and the final decree did not include her as a party against whom judgment was rendered.

The Opinions Below.

The suit came before the District Court on stipulated facts (R. 16-19), resulting in a decree in favor of respondent, and the Circuit Court of Appeals for the Second Circuit unanimously affirmed. The District Court's opinion is reported at 64 F. Supp. 179, and that of the Circuit Court of Appeals at 156 F. (2d) 603.

Summary Statement of the Matter Involved.

The suit involved admitted liability for the loss of part of the contents of one of two cases owned by respondents, shipped under a bill of lading (reproduced at R. 19) from New York to Guayaquil, Ecuador, on the S. S. *Campfire.* The loss amounted to $674.94, equivalent to 41.8% of the full value of the shipment, viz. $1,619.47. On a stipulation for judgment, both Courts below held the cargo owners were entitled to recover $500, being the limit of liability provided for in § 4 (5) (quoted at R. 21, 22) of the *Carriage of Goods by Sea Act* (Act of April 16, 1936, c. 229, 49 Stat. 1207, 46 U. S. C. § 1300, *et seq.*). Petitioners and the United States of America had contended that on the basis

of Clause 17 of the bill of lading (quoted at R. 20, 21), their liability was limited to $209, being 41.8% of the $500 statutory limit of liability.

The Question Involved.

The first paragraph of the opinion of the Circuit Court of Appeals correctly summarized the issue:

> "This appeal presents the question whether the Carriage of Goods by Sea Act, 46 USCA § 1300, *et seq.*, invalidates a bill of lading provision for pro-rating in case of the partial loss by the carrier of a package to which the statute ascribes a value of $500."

instead of that stated by petitioners who endeavor to limit the issue to whether it is only Section 4 (5) of the Act which bars application of the bill of lading clause. Section 3 (8) of the Act must be read in conjunction with Section 4 (5). They read:

> 3(8) "Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect."
>
> 4(5) "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if

embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

"By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided,* That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained."

Both the District Court and the Circuit Court of Appeals rightly held the bill of lading clause would lessen, in violation of the prohibition in § 3 (8), the carrier's liability other than as authorized by the Act, namely, to $500 a package as provided in § 4 (5), and was therefore invalid.

POINT I.

No principle is involved or issue presented requiring consideration by this Court.

(a) There is no conflict among the Circuits.

There is no decision directly on the point other than that of the Courts below. On the reason for this, the Circuit Court of Appeals said (pp. 604, 605):

"The appellants argue * * * that, although the carriers have persistently continued to incorporate the pro-rata clause in their bills of lading issued after enactment of the statute in 1936 no judicial decision, except the one at bar, has ever held the clause invalid. The point as to the carrier's practice and the absence of judicial authority, both here and in foreign countries whose legislation has adopted the Hague Rules is well answered by the appellee's statement that the many suits for partial losses have all been settled by the carriers in order to avoid the test. They say that the appellants will not question this statement, and in fact they have not in their reply briefs. * * *"

(b) No need exists for this Court to pass on the question; there being decisions of this Court stating principles which support the rulings in the Courts below, and none in conflict therewith.

The closest approach in decisions of this Court to the issue in this case is found in *Chicago M. & St. P. Rwy. Co.* v. *McCaull-Dinsmore Company,* 253 U. S. 97. The principles enunciated in that case support the decision below.

The *Railway Company* case involved the interpretation of the clause in the *Cummins Amendment* of the *Interstate Commerce Act* which prohibits limitation of a carrier's liability below the basis therein stated, namely, the full actual loss [49 USC 20 (11)]. There is a pronounced similarity between the language of the *Cummins Amendment* and Section 3 (8) of the *Carriage of Goods by Sea Act.*

The Railway, in its bill of lading and tariffs, sought to limit its liability to market value at the point of origin. It argued that in so doing, it was not attempting to limit its liability, but merely to define it, and accordingly it was not unlawful to agree upon value at the point of origin as the measure of damages. In sustaining a judgment for the shipper, this Court, as did the Courts below, rejected the argument. The Circuit Court of Appeals said (260 Fed. 835, 837) that Congress intended by the legislation "* * * to fully and finally prevent all limitations of this character * * *", and this Court, in condemning the clause, said (p. 100) it operated to "* * * prevent a recovery of the full actual loss * * *".

(c) No issue of great public concern is involved.

The question of pro-rating for a partial loss under a clause already limiting liability to $500 a package is not of great public concern. It involves relatively few of the bulk of packages transported by water in foreign trade and then only while the goods are actually on board the vessel (§ 1, 13). Indicative of the lack of a question of

public concern and the apparent lack of faith of senior Government counsel in the propriety of or necessity for this petition is the failure of the United States of America to join in the petition and the fact that only two District Court decisions are cited by petitioners and they were decided on principles of common law before the enactment of the *Carriage of Goods by Sea Act.* In one of them—*Bingham & Co.* v. *Osaka,* 12 F. Supp. 35, 1935 A. M. C. 1103—the libel was dismissed, so that the comment at the end of the case about liability being limited to a proportionate amount is pure dictum. Furthermore, it relied on the other case cited by petitioners—*Olivier Straw Goods Corp.* v. *Osaka,* 42 F. (2d) 717, where the Court will note the question of apportioning damages for a partial loss was not involved and all the District Court did was to approve the particular form of valuation clause there in question.

POINT II.

The decisions of the Courts below conform absolutely to the intent of Congress and the terms of the Act.

The answers to petitioners' Points I and III are found in the proceedings before Congressional Committees and related hearings and in the plain language of the *Carriage of Goods by Sea Act.* They indubitably establish that it was intended the Act should prohibit *any* reduction by any device whatsoever—pro-rating included—in an ocean carrier's $500 per package liability for *any* loss or damage.

The *Carriage of Goods by Sea Act* has its origin in and closely follows the *Hague Rules* of 1921 and 1922—a voluntary statement of principles by those engaged in international trade—thereafter incorporated in the *Brussels Convention* (1924) as to which the Senate gave its advice and consent on April 1, 1935 and which was signed by President

Roosevelt on April 17, 1936, the same day he signed the *Carriage of Goods by Sea Act.* Despite the implementation of the *Rules* in the *Convention,* American interests deemed it desirable that they be made a part of the statute law of the United States,—hence the passage of the Act.

It is important to note that of the two sections of the Act which are of consequence in this case, § 3 (8) is identical with the corresponding section of the Convention and § 4 (5) likewise is practically identical except that in the Act "$500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit," are substituted for the words "100 pounds sterling per package or unit".

By the time the Act (then known as S 1152) reached the stage where Congressional Committees were prepared to recommend its passage, there was absolutely no question as to what Section 4 (5) meant in the light of Section 3 (8). In favorably reporting S 1152, the Senate Committee on Commerce said of the Bill:

> "• • • It will also accomplish real uniformity and agreement with many other nations as to the texts of those clauses of ocean bills of lading with which the Bill deals" (Senate Report No. 742—74th Congress, 1st Session, dated May 13, 1935, p. 4).

That report was submitted after all interests had been heard. At page 47 of the official minutes of the hearings there is recorded the undisputed statement in a carefully prepared exposition of the legislation accepted by the Committee that:

> "Another beneficial and noteworthy provision of the Hague Rules is the stipulation which makes the carrier *liable* for loss or damage *up to £100 per package,* or unit, unless a greater value shall have been declared by the shipper and inserted in the bill of lading. This is important when we recall

> that present limits are usually either $100 or $250; in fact, one instance is recorded of a limit of 10 francs. *In addition, no pro rating clause is contained in the Hague Rules, and the carrier must pay up to £100 per package and not a proportionate amount of the actual value''* (Italics supplied).

The House Committee on Merchant Marine and Fisheries in its favorable report on the bill under the heading "Purpose of Legislation", said:

> "The purpose of this bill is to define by law the rights and liabilities of water carriers and shippers in foreign commerce. *It fixes the irreducible minimum of immunity of the carrier from liability''* (Italics supplied).

In the background of American adherence to the principles outlined in the *Hague Rules* are the public hearings thereon held by the United States Shipping Board on September 20 and 21, 1922 referred to in both the District Court and Circuit Court of Appeals opinions. The expression and agreement by counsel who regularly represent shipowners and of others at those hearings was so definite that pro-rating for partial losses was no longer permissible that the question was thereafter and up to and including passage of the Act treated as settled. The counsel expressing the shipowners' agreement that pro-rating was a thing of the past were Messrs. Charles S. Haight, then appearing as Chairman of the Bill of Lading Committee of the International Chamber of Commerce, Roscoe H. Hupper, for the Hague Rules Committee of the Maritime Law Association of the United States, and Ira A. Campbell, for the American Steamship Owners Association. Others heard were Mr. McComb of the Marine Office of America, Captain Berry, Chairman of the Shipping Board Bill of Lading Committee and Mr. Herrick of the Institute of American Meat Packers. Taken from the

minutes of the Shipping Board proceedings entitled "Hearings before a Committee of the United States Shipping Board for the Purpose of Considering Revision of Rules for the Carriage of Goods by Sea", their statements were:

> "Mr. McComb (interposing): Section 5 of that. I think that might be made clearer. Mr. Haight, I believe it is your understanding that 100 pounds liability is up to 100 and does away with the pro rating clause?
>
> "Mr. Haight: I understand that there is no pro-rating under that.
>
> • • • • • • • •
>
> "Mr. Berry: Mr. McComb, have you no objection to any other portions of Section 5 of Article 4? Are you satisfied with the rest of the section?
>
> Mr. McComb: If there is no pro rating, yes" (p. 40).
>
> • • • • • • • •
>
> "Mr. Herrick: The raising of the limit, as I understand it, does not mean the carrier agrees to pay $500 for every package lost. I think that was the inference Mr. Campbell's remarks carried.
>
> "Mr. Campbell: *To pay the value of the goods lost not to exceed $500"* (Italics supplied) (pp. 115, 116).
>
> "Mr. Haight: • • • Now, those complaints in America were aimed at three major propositions. The shipper said, 'It isn't fair to limit this liability to a nominal sum and then pro rate; to give a package worth $500 and damage it $25 and give a check for $20' • • •.
>
> "Those complaints have been voiced in this country, but they have been just as vociferous in other parts of the world" (p. 189).
>
> "Mr. Haight: • • • Mr. McComb also suggested a 100 pound limitation without pro rating. *I understand under the rules you can't pro rate. I quite agree you ought not to be allowed to pro rate"* (Italics supplied) (p. 215).

> "Mr. Hupper: * * * The next provision is Paragraph 5, the valuation clause. * * * The effect of that really is no valuation or limitation clause because most packages are under £100. Of course, there are some that are over. It is not unfair there should be some limitation. *Of course, our friends, the shippers, have accomplished in this clause, as it stands, what has long been their desire, to get away from the pro rating clause.* They were met not infrequently in the case where valuation was $100 and the goods were worth $1,000 and there was a damage of 50 per cent, and therefore they would get 50 per cent. *That was a sore spot and they have gotten away from that"* (Italics supplied) (p. 132).

With the foregoing in mind, it is instructive to note that in the legislative history of the Act there is not a single indication that anyone contended, or even thought, that pro rating had been preserved, or that anything less than actual damages with a ceiling of $500 per package could be agreed upon.

But this Court need not rest a denial of the petition on the foregoing. The plain language of the Act is sufficient. It expressly forbids incorporation in a contract for ocean carriage of "*any* clause, covenant, or agreement" relieving the carrier from or *lessening* its liability "in connection with the goods * * * *otherwise* than as provided in this Act". A pro rata clause is certainly "in connection with the goods" and as certainly represents a *lessening* of liability "otherwise than as provided in this Act". At no place does the Act "provide" for a pro rata clause.

Section 4 (5) is the only section of the Act permitting a carrier to lessen its liability below the normal measure—the full amount at sound market value—(*Steamship Ansaldo San Giorgio I* v. *Rheinstrom Bros. Co.*, 294 U. S. 494, 496; *St. Johns N. F. Shipping Corporation, etc.* v. *S. A. Companhia Geral Commercial, etc.*, 263 U. S. 119, 125; *Steel Inventor*, 35 F. Supp. 986). It will be seen the

section neither makes nor infers nor contemplates a distinction between a partial and total loss. It uses a plain word in saying it covers any loss or damage. It thereby fixes a shipper's recovery for *any* loss, partial or whole, at the sum therein stated, i. e., the amount of damage actually sustained not exceeding $500 a package unless an actual higher value is declared. *It specifically forbids an agreement fixing damages at less than $500* for a package of greater value. This limitation, of course, is of distinct advantage to the carrier. It is thereby able to calculate the limit of liability it could incur when it embarks on a voyage, namely $500 per package. That would be the maximum. The carrier's liability would generally be less inasmuch as most packages are of a lower value than $500.

Patently, petitioners' plea of freedom to contract for a pro rata provision flies in the face of the exact terms of the statute.

Petitioners seek to persuade this Court that Section 3 of the Act has no relation to the basis on which a cargo owner is to be compensated for losses chargeable to the carrier. Nothing could be further from the fact. Subdivision (2) says "The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried" and sub-division (8) forbids the carrier from contracting to relieve itself from liability for loss "*arising from* negligence, fault, or *failure in the duties and obligations* provided in this section, or lessening such liability otherwise than as provided in this Act". Clearly, then, the duty and obligation to "properly and carefully * * * keep, care for, and discharge the goods" imposed by sub-division (2) is one of the duties and obligations referred to in sub-division (8) because it is part of "this section" number 3.

The excerpt from Mr. Robinson's "Handbook of Admiralty Law in the United States" does not even suggest

pro rating clauses are valid. On the contrary, it points out the only thing permitted a carrier is to limit its liability to the statutory $500 a package.

The statement quoted from Mr. Knauth's book was made with absolutely no authority to support it, and is the only one of that tenor to be published as a textwriter's view under the *Carriage of Goods by Sea Act.* Both Courts below had it before them and were unpersuaded thereby. Significantly, Mr. Knauth wrote the brief and argued the appeal for the Government in the Circuit Court of Appeals, yet the United States did not deem the statement to be so legally sound, or the issue so important, as to warrant joining in this petition.

The balance of the matters discussed in petitioners' Points I and III were brought up in the Courts below and, as appears from the decisions, were fully and carefully considered by them, but found to be wanting as a basis for permitting the carrier to lessen liability below $500 a package.

The British Courts and text-writers have no doubts as to the elimination of a carrier's right to lessen liability under the *Hague Rules.* Mr. Justice (now Lord) Wright in the case of *Gosse Millard* v. *Canadian Government Merchant Marine, Limited* (1927) 2 K. B. 432, 434, said:

> "These Rules, which now have statutory force, have radically changed the legal status of sea carriers under bills of lading. According to the previous law, shipowners were generally common carriers, or liable to the obligations of common carriers, *but they were entitled to the utmost freedom to restrict and limit their liabilities,* which they did by elaborate and mostly illegible exceptions and conditions. Under the Act and the Rules, which *cannot be varied* in favour of the carrier by any bill of lading, *their liabilities are precisely determined,* and so also are their rights and immunities. * * * " (Italics supplied).

His decision was affirmed by the House of Lords [(1929) A. C. 223], where Viscount Sumner said (p. 236):

> "* * * The *intention* of this legislation in dealing with the liability of a shipowner as a carrier of goods by sea undoubtedly was to *replace* a *conventional contract,* in which it was constantly attempted often with much success, to relieve the carrier from every kind of liability, *by a legislative bargain,* * * *" (Italics supplied).

Additional cases are *W. Angliss and Company (Australia) Proprietary, Limited* v. *Peninsular and Oriental Steam Navigation Company* (1927) 2 K. B. 456, 460, 461, where the Court said a carrier's freedom to vary or limit its liabilities by contract was destroyed under the Act, and *Vita Food Products, Incorporated* v. *Unus Shipping Company, Limited* (1939) A. C. 277, 287, 288, in the course of which the Court said:

> "* * * Art. III (8) *avoids any clause* or agreement relieving the carrier from the liability for negligence imposed by the rules or *lessening* that *liability* * * *" (Italics supplied).

British text-writers are unanimous in their view. Mr. Sanford D. Cole in the Third Edition of his work *"The Hague Rules Explained, Being the Carriage of Goods by Sea Act, 1924"* makes the following pointed statement at page 109:

> "Under the above Art. IV 5 of the Rules, *a loophole existing in the Harter Act* and similar legislation (with the exception probably of the Canadian Act) *will be closed.* The Rules in effect embody a suggested amendment of the Harter Act which has been the subject of discussion in American shipping circles. The object of this amendment would be to negative decisions of the American courts that, notwithstanding the provision in the Harter Act de-

> claring it illegal for shipowners to contract out of liability, it is nevertheless lawful for the parties to agree upon a value for the goods, by which means shipowners effectively limit their liability for losses to cargo. *Under the Rules a reduced limit cannot be agreed, as the amount named as a maximum (subject to increase by agreement) is declared also to be a minimum limit"* (Italics supplied).

See also Temperley's *"Carriage of Goods by Sea Act, 1924"*, 3rd Edition, Introduction, page 1, page 80; *Scrutton on Charter Parties and Bills of Lading,* 13th Edition, pages 498, 499.

Petitioner's suggestion that the pro rating provision be considered as part of a valid valuation clause is untenable. Section 4 (5) of the Act has been held to be a limitation of liability clause and not a valuation clause. *Stirnimann* v. *The San Diego,* 55 F. Supp. 798, Aff'd. 148 F. (2d) 141; *Shackman, et al.* v. *Cunard White Star, Limited,* 31 F. Supp. 948; *Steel Inventor, supra.* The corresponding section in the *Hague Rules* was so understood. Mr. Hupper, at the Shipping Board hearings in 1922, said (p. 132):

> "* * * It seems to me, as it stands, *it is not a valuation* clause as we understand the term, *but a mere limitation* * * *" (Italics supplied).

See also *Chicago, M. & St. P. Rwy. Co.* v. *McCaull Dinsmore Company, supra.*

POINT III.

The determination of the Circuit Court of Appeals guarantees uniformity of practice among American and foreign carriers.

Petitioners' Point II is likewise completely without merit. By the very terms of the *Carriage of Goods by Sea Act,* no disadvantage can possibly come to American flag

carriers competing with foreign operators. That is so because the Act is applicable to all bills of lading relating to carriage of goods by sea on *any* vessel *to or from* ports of the United States in *foreign* trade. [§ 1 (a), (d), 13.] Thus, whether the goods are carried on an American or foreign flag vessel makes no difference. That act covers in both instances. The Rule laid down by the Circuit Court of Appeals obviously must and will be applied in identical manner and without fear or favor, regardless of nationality.

The argument that with fluctuating rates of exchange, foreign owners may be called upon to pay the equivalent of less than $500 a package is completely wrong. Section 4 (5) imposes on a carrier, whether American or foreign, the obligation to pay $500 "or the equivalent of that sum in other currency". Furthermore, the suggestion demonstrates the fallacy of petitioners' position. If a foreign owner could pay for the loss of an entire package in depreciated foreign currency, it could do the same on a pro rata basis if pro rating were valid, and foreign owners would still have the advantage. If the question of fluctuations in exchange is considered, the possibility, however remote, that United States currency would be the cheaper cannot be ruled out, in which event the advantage would be with American carriers.

Although not within the stipulation of facts (R. 16-19), petitioners *after* the matter was argued in the District Court submitted specimen bills of lading of some, but not all, of foreign steamship lines which obviously were intended only to cover transportation of cargoes from United States to foreign ports, and which contained pro rating clauses. They were not part of the record certified to the Circuit Court of Appeals (R. 37) but were handed up by petitioners on the argument before that Court. Certainly, foreign lines would be foolish not to use a form

similar to that adopted by American carriers on shipments bound from the United States. Petitioners, not having submitted a bill of lading clearly intended to cover transportation of goods inbound to the United States, respondents did so, handing to the District Court a Cunard White Star Line bill of lading covering transportation of goods from London to New York (Exhibit 13). It showed that one of the very companies (Cunard White Star), which used a pro rating clause on outbound shipments, omitted it on inbound shipments. It is by no means the only outbound or inbound bill of lading so framed. Many other foreign steamship companies use the same type of bill of lading as Exhibit 13. It is the complete answer to petitioners' argument. Foreign carriers, recognizing the invalidity of any pro rating clause under their own and this country's Carriage of Goods by Sea Acts do not insert it in bills of lading issued in foreign countries because they know the courts would condemn it, but some of them followed the American carriers' practice on bills of lading issued in this country for what it was worth in settling claims with cargo owners not having knowledge of its invalidity.

CONCLUSION.

It having been demonstrated that no principle is involved or issue presented requiring consideration by this Court, and that the determination of the Courts below clearly conforms with the Carriage of Goods by Sea Act, the petition for a writ of certiorari should be denied.

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